

MANUFACTURER'S PRICE LISTS MUST REFLECT ACTUAL RETAIL PRICES

Regina Corp. v. Federal Trade Commission
322 F.2d 765 (3d Cir. 1963)

A manufacturer of electric floor polishers and vacuum cleaners supplied his wholesale and retail distributors with "manufacturer's list prices." The distributors included these list prices in their local newspaper advertisements in juxtaposition with their own generally lower retail prices. The manufacturer at times contributed to the cost of these advertisements. After investigation and hearing, upon a complaint to the Federal Trade Commission, the trial examiner found that the manufacturer's list prices were fictitious in that the products were never sold at these list prices, and that the retailers' prices were the customary charges for these products. The Commission found that the manufacturer knew that the retailers' prices were usually lower, that consumers reading the advertisements were led to believe that the manufacturer's list prices were the normal retail prices for the products, and that consumers were thereby induced to purchase believing that they were getting a bargain. The Commission concluded that the manufacturer, by supplying these fictitious list prices, put into the retailers' hands the means of deceiving the public within the meaning of section 5 of the Federal Trade Commission Act.¹ The Commission issued an order, directing the manufacturer to cease and desist from placing in the hands of any retailer any material containing "manufacturer's list prices" which the manufacturer knows, or should know, are in excess of the prices at which the products to which they refer are customarily sold at retail in the trade area where the list prices are supplied.²

In challenging the original complaint, Regina based its defense on the factual argument that its list prices were not excessive or fictitious,³ thus conceding the FTC's premise that if Regina's list prices were fictitious, there would exist a violation of section 5. The conclusion that the practice of disseminating fictitious list prices is illegal is based on the current policy of protecting consumers from deceptive practices in advertising. This policy has developed rapidly in recent years as one-by-one other cases, and now *Regina*, have applied the broad language of section 5 to a multitude of business practices declaring them to be deceptive acts of commerce and hence illegal.

In 1914 Congress enacted the original Federal Trade Commission Act,⁴ giving effect to public opinion against deceptive business practices. Although

¹ Federal Trade Commission Act § 5, as amended, 66 Stat. 632 (1952), 15 U.S.C. §45 (a) (1) (1959). "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

² *Regina Corp. v. FTC*, 322 F.2d 765 (3d Cir. 1963).

³ *Id.*, at 767.

⁴ Federal Trade Commission Act, § 1, 38 Stat. 717 (1914).

clothed with a public interest, the Federal Trade Commission under the original section 5 could act only where actual or potential injury to competition could be shown.⁵ In 1931, the Supreme Court in *FTC v. Raladam Co.*⁶ held that the Commission could not act where only injury to the public resulted from deceptive practices. This case prompted the passage of the Wheeler-Lea Amendment⁷ which, in effect, extended the jurisdiction of the Federal Trade Commission to all cases where injury to the public existed regardless of the presence of injury to competition.⁸ Thereafter, the cases recognized fictitious pricing not only as unfair competition, but also as a violation of the act itself, since the practice was deceptive to the public.⁹

The trend progressed when subsequent cases held that neither intent to deceive¹⁰ nor actual deception¹¹ of the public was required to constitute violations of the act. It has also been established that the statements in question need not be false in fact, where deception can be accomplished by innuendo;¹² and that one who places in the hands of another the means of deceiving the public is himself guilty of violating the act.¹³ In short, the law now prohibits business practices which tend to deceive the public as to the true value or quality of the products offered for sale. This protection of the public, which is extended to the unthinking, ignorant and impulsive buyer, is predicated on the principle that public good-will promotes competition and prosperity, and on the underlying belief that fair play should govern business dealings.

Deceptive pricing has become one of the most prevalent forms of false advertising today.¹⁴ Deceptive pricing can take many forms, the most recent of which is the "manufacturer's list price." This relatively new idea probably evolved from the ceiling prices established for some products by

⁵ *International Shoe Co. v. FTC*, 280 U.S. 291, 297-299 (1930); *FTC v. Winsted Hoisery Co.*, 258 U.S. 483 (1922).

⁶ 283 U.S. 643, 646-647 (1931).

⁷ Wheeler-Lea Amendment § 3, 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1959).

⁸ *Pep Boys-Manny, Moe and Jack Inc. v. FTC* 122 F.2d 158 (3d Cir. 1941); *Thomas v. FTC*, 116 F.2d 347 (10th Cir. 1940).

⁹ *International Art Co. v. FTC*, 109 F.2d 393, (7 Cir. 1940); *Thomas v. FTC*, *supra* note 8.

¹⁰ *Bankers Securities Corp. v. FTC*, 297 F.2d 403 (3d Cir. 1961); *Pep Boys-Manny, Moe and Jack, Inc. v. FTC*, *supra* note 8.

¹¹ *FTC v. Sterling Drugs, Inc.* 317 F.2d 669, (2d Cir. 1963); *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957); *Progress Tailoring Co. v. FTC*, 153 F.2d 103 (7th Cir. 1946).

¹² *Baker's Franchise Corp. v. FTC*, 302 F.2d 258 (3d Cir. 1962). A manufacturer claimed that its bread contained less calories per slice than any other regular white bread. This claim was true because the bread had thinner slices; but based upon lay testimony at the hearing, the Commission concluded that consumers were led to believe that this bread would help them lose weight as a dietary product, and that they were thereby deceived within the meaning of section 5.

¹³ *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273 (4th Cir. 1952); *FTC v. Winsted Co.*, *supra* note 5, at 494.

¹⁴ Barnes, "False Advertising," 23 Ohio St. L.J. 597, 629 (1962).

war emergency federal legislation.¹⁵ In 1958, the Federal Trade Commission published guides to be used by its staff in determining whether certain pricing practices violated the act. One of the major abuses listed was false savings claims based on terms such as "manufacturer's list prices" and "manufacturer's suggested retail prices" used in quoting excessive retail prices, and thereby deceiving the public.¹⁶

There has been much recent litigation on the closely associated practice of placing fictitious retail prices on the actual product itself, or "preticketing,"¹⁷ and the Federal Trade Commission has issued cease and desist orders to other manufacturers¹⁸ who were issuing or publishing fictitious manufacturer's list prices prior to the *Regina* decision. Therefore, in *Regina*, the court of appeals confirmed the policy of the Federal Trade Commission of condemning fictitious list pricing.

The most typical argument against a cease and desist order prohibiting fictitious list prices is that competitors of the respondent are engaging in the same practice and that by being "singled out" the respondent will be put at a competitive disadvantage and suffer great financial loss.¹⁹ In *Regina*, the court of appeals dispensed with this argument, as it has in the past, saying that in the absence of a patent abuse of discretion, the Commission is empowered to employ whatever remedy it deems necessary to achieve the ends contemplated by Congress, and that the court will not refuse enforcement of an order just because the law is not being strictly enforced against others.²⁰

Two other arguments frequently advanced in support of manufacturer's list prices are (1) that a standard price set by the manufacturer establishes the product and its supposed quality in the consumer's mind thus enabling him properly to identify the product, and (2) that Congress sanctioned the use of manufacturer's list prices by requiring their use by the automobile industry under the Automobile Information Disclosure Act.²¹ As to product identification, there are more effective methods of identifying products than by a non-descriptive price. These methods include trade names, model numbers, and product descriptions. To argue that a fictitious list

¹⁵ Comment, "Deceptive Advertising Practices," 39 Texas L. Rev. 903, 906 (1962).

¹⁶ 2 CCH Trade Reg. Rep. § 7897 (1958).

¹⁷ *Helbros Watch Co., v. FTC*, 310 F.2d 868 (D.C. Cir. 1962); *Clinton Watch Co. v. FTC*, 291 F.2d 838 (7th Cir. 1961). See Address by Daniel J. Murphy, American Marketing Association, New York, N.Y., December 27, 1961, in 6 Antitrust Bull. 419, 426.

¹⁸ *In re Firestone Tire Co.*, 33 F.T.C. 282 (1941); *In re Hutchinson Chemical Corp.*, 55 F.T.C. 1942 (1959); *In re Forbes & Wallace, Inc.*, 56 F.T.C. 41 (1959); *In re Sam Schneider, dba Continental Sales & Sewing Mach. Co.*, 56 F.T.C. 36 (1959).

¹⁹ *Regina Corp. v. FTC*, *supra* note 2, at 769; *Accord*, *Clinton Watch Co. v. FTC*, *supra* note 17, at 840; *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir. 1960).

²⁰ Cases cited note 19 *supra*; See Jaffe, "The Judicial Enforcement of Administrative Orders," 76 Harv. L. Rev. 865, 878 (1963).

²¹ Automobile Information Disclosure Act, 72 Stat. 325 (1953); 15 U.S.C. §1231-1233 (1959).

price will enable consumers to identify the product lends little support to a respondent's position. As to the second argument, Congress passed the Automobile Information Disclosure Act because of the deceptive pricing practices existing in the automobile industry. The act requires manufacturers to inform the consumer of the true market price of the automobile and its accessories in order to eliminate dealer's deceptive practices. It is clear that the act applies only to the automobile industry and that Congress did not approve the use of *fictitious* list pricing.²² It is important to note that the court of appeals has not ruled that list prices are illegal per se, but only that they are illegal when they are fictitious.²³

That honesty in business should govern our competitive system has been long established.²⁴ The traditional doctrine of *caveat emptor* has gradually given way to a rule that gives the consumer the right to rely on the representations of merchants as true.²⁵ Mutual confidence between buyer and seller is necessary to our economy, and when buyer confidence is destroyed by deceptive practices, the free workings of supply and demand are distorted. By deception, the seller is able to obtain money from the buyer that he would not otherwise obtain. After realizing that he has been deceived, the buyer becomes confused as to the true value of goods, and he is reluctant to invest again. The honest seller is affected in that the buyers are unfairly diverted from his product and over the long run the seller feels the general business decline generated by the buyers' reluctance to invest. Once fictitious pricing has proven successful in an industry, the honest businessman often find it necessary to resort to such practices as a matter of survival. Thus, fictitious pricing not only affects the individual competitor, but by eventually infecting entire industries, the practice may adversely affect the whole economy.

When honest business practices prevail, the supply and demand principle runs true to form. The price of goods is established and the buyer relies on the price as a true indication of the products' value. The consumer is willing to purchase and bases his choice among makes of products on such rational factors as utility, quality, appearance, and true price difference. When the consumer is able to base his choice on the qualitative difference among the various makes, competition is promoted which tends to encourage higher quality production.²⁶

Although the injury from deceptive pricing may be great in the aggregate, the loss to the individual may not be sufficient to warrant a private suit to stop the unfair practice. Therefore the consumer's right to be

²² *Baltimore Luggage Co. v. FTC*, 296 F.2d 603, 611-612 (4th Cir. 1961); See *Murphy*, *supra* note 17.

²³ *Regina Corp. v. FTC*, *supra* note 2, at 770; *Helbros Watch Co. v. FTC*, *supra* note 17, at 870 n.9; *Baltimore Luggage Co. v. FTC*, *supra* note 22, at 612.

²⁴ *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937).

²⁵ *FTC v. Sterling Drugs, Inc.*, *supra* note 11, at 674.

²⁶ *Murphy*, *supra* note 17, at 427-428; Comment, "Deceptive Advertising Practices," *supra* note 15; Moore, "Deceptive Trade Practices and the FTC," 28 *Tenn. L. Rev.* 493, 504 (1961).

protected from deceptive pricing is generally enforced only through an administrative agency acting in the interest of all consumers.

Because the FTC can act only against those manufacturers engaged in interstate commerce, action against deceptive pricing has been limited in scope.²⁷ A substantial percentage of manufacturing is confined within state boundaries, and the majority of retailers do not engage in interstate commerce.²⁸ It follows, therefore, that if the policy of protecting the consumer from deceptive pricing practices is to be effectively enforced, the various state and local agencies should actively assist in demanding higher standards of business ethics.

It is evident that the harmful affects of fictitious list pricing on economics and competition warrant the conclusion that the practice should be condemned. But, injury to competition and to our economy are *results* of deception of the public. Thus, it would be reasonable to conclude that Congress made deceptive acts in commerce unlawful because such practices may lead to unfair competition or harm to the economy as a whole. However, a closer look at section 5 of the act reveals an intent to apply the statute broadly to cases where public deception has no direct relation whatsoever to economics or competition.²⁹ The consumer is given legal protection. An injury occurs when the consumer is misled as to the true market value of his purchase, and as to anticipated savings. The manufacturer is in a position to know the true market value of his product while the consumer must rely to a great extent on what he is told. The consumer and manufacturer are not in a position to deal at "arm's length" as to the price of the product, and for the manufacturer to deceive the consumer is contrary to our concept of fair play. It is obvious that the law cannot aid consumers whose injury is caused by their own misjudgment of known facts, but protection should be afforded to those injured through deception. The manufacturer's product should stand on its own merits in the market place and if it cannot compete on this basis, it should not be allowed to compete through deceptive means.

²⁷ Murphy, *supra* note 17, at 427.

²⁸ *Ibid.*

²⁹ "This amendment [to FTC Act §5] makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor." 83 Cong. Rec. 3255 (1938) (remarks of Senator Wheeler).